

AMENDED IN SENATE SEPTEMBER 4, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 926

**Introduced by Assembly Member Ruskin
(Principal coauthor: Assembly Member Hill)
(Coauthor: Assembly Member Price)**

February 26, 2009

An act to amend Section 14837 of the Government Code, to amend Section 999 of the Military and Veterans Code, and to amend Sections 10111, 10302, 10344, and 12104.5 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 926, as amended, Ruskin. State contracts: goods: loss leader.

(1) Existing law requires the Department of General Services to make available a report on contracting activity containing specified information, as provided.

This bill would expand the reporting requirements of the Department of General Services in the years 2011 and 2012, to include any errors reported to the Department of General Services, as specified.

(1)

(2) Existing law governs contracting between state agencies and private contractors, and sets forth requirements for the procurement of materials, supplies, equipment, and services, and the acquisition of information technology goods and services by state agencies. Under existing law, it is unlawful for any person engaged in business with this state to sell or use any article or product as a "loss leader," as defined.

This bill would require a statement of this latter provision to be specified in a solicitation for a state contract for goods, a request for

proposal for a contract for services that involves the furnishing of equipment, materials, or supplies and a request for proposal for a state contract for the acquisition of information technology goods and services. *This bill would require an awarding agency, on and after March 31, 2010, and until December 31, 2011, if this statement is not contained in a solicitation or request for proposal, to report this error to the Department of General Services. This bill would require the Department of General Services to post in the State Contracting Manual instructions for including this statement in all affected contracts. This bill would provide that this statement shall be deemed to part of a solicitation or request for proposal even if the statement is inadvertently omitted from the solicitation or request for proposal.*

(2)

(3) Existing law encourages state agencies that enter into contracts to establish goals to facilitate the participation of small businesses and disabled veteran business enterprises.

This bill would make technical, nonsubstantive changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 14837 of the Government Code is
2 amended to read:
3 14837. As used in this chapter:
4 (a) “Department” means the Department of General Services.
5 (b) “Director” means the Director of General Services.
6 (c) “Manufacturer” means a business that meets both of the
7 following requirements:
8 (1) It is primarily engaged in the chemical or mechanical
9 transformation of raw materials or processed substances into new
10 products.
11 (2) It is classified between Codes 31 to 33, inclusive, of the
12 North American Industry Classification System.
13 (d) (1) “Small business” means an independently owned and
14 operated business that is not dominant in its field of operation, the
15 principal office of which is located in California, the officers of
16 which are domiciled in California, and which, together with
17 affiliates, has 100 or fewer employees, and average annual gross

1 receipts of ten million dollars (\$10,000,000) or less over the
2 previous three years, or is a manufacturer, as defined in subdivision
3 (c), with 100 or fewer employees.

4 (2) “Microbusiness” is a small business which, together with
5 affiliates, has average annual gross receipts of two million five
6 hundred thousand dollars (\$2,500,000) or less over the previous
7 three years, or is a manufacturer, as defined in subdivision (c),
8 with 25 or fewer employees.

9 (3) The director shall conduct a biennial review of the average
10 annual gross receipt levels specified in this subdivision and may
11 adjust that level to reflect changes in the California Consumer
12 Price Index for all items. To reflect unique variations or
13 characteristics of different industries, the director may establish,
14 to the extent necessary, either higher or lower qualifying standards
15 than those specified in this subdivision, or alternative standards
16 based on other applicable criteria.

17 (4) Standards applied under this subdivision shall be established
18 by regulation, in accordance with Chapter 3.5 (commencing with
19 Section 11340) of Part 1 of Division 3 of Title 2, and shall preclude
20 the qualification of businesses that are dominant in their industry.
21 In addition, the standards shall provide that the certified small
22 business or microbusiness shall provide goods or services that
23 contribute to the fulfillment of the contract requirements by
24 performing a commercially useful function, as defined below:

25 (A) A certified small business or microbusiness is deemed to
26 perform a commercially useful function if the business does all of
27 the following:

28 (i) (I) Is responsible for the execution of a distinct element of
29 the work of the contract.

30 (II) Carries out its obligation by actually performing, managing,
31 or supervising the work involved.

32 (III) Performs work that is normal for its business services and
33 functions.

34 (ii) Is not further subcontracting a portion of the work that is
35 greater than that expected to be subcontracted by normal industry
36 practices.

37 (B) A contractor, subcontractor, or supplier will not be
38 considered to perform a commercially useful function if the
39 contractor’s, subcontractor’s, or supplier’s role is limited to that
40 of an extra participant in a transaction, contract, or project through

1 which funds are passed in order to obtain the appearance of small
2 business or microbusiness participation.

3 (e) “Disabled veteran business enterprise” means an enterprise
4 that has been certified as meeting the qualifications established by
5 subdivision (g) of Section 999 of the Military and Veterans Code.

6 SEC. 2. Section 999 of the Military and Veterans Code is
7 amended to read:

8 999. (a) This article shall be known as, and may be cited as,
9 the California Disabled Veteran Business Enterprise Program. The
10 California Disabled Veteran Business Enterprise Program is
11 established to address the special needs of disabled veterans
12 seeking rehabilitation and training through entrepreneurship and
13 to recognize the sacrifices of Californians disabled during military
14 service. It is the intent of the Legislature that every state
15 procurement authority honor California’s disabled veterans by
16 taking all practical actions necessary to meet or exceed the disabled
17 veteran business enterprise participation goal of a minimum of 3
18 percent of total contract value.

19 (b) As used in this article, the following definitions apply:

20 (1) “Administering agency” means the Treasurer in the case of
21 contracts for professional bond services, and the Department of
22 General Services’ Office of Small Business and Disabled Veteran
23 Business Enterprise Services, in the case of contracts governed by
24 Section 999.2.

25 (2) “Awarding department” means a state agency, department,
26 governmental entity, or other officer or entity empowered by law
27 to issue bonds or enter into contracts on behalf of the state.

28 (3) “Bonds” means bonds, notes, warrants, certificates of
29 participation, and other evidences of indebtedness issued by, or
30 on behalf of, the state.

31 (4) “Contract” includes any agreement or joint agreement to
32 provide professional bond services to the State of California or an
33 awarding department. “Contract” also includes any agreement or
34 joint development agreement to provide labor, services, materials,
35 supplies, or equipment in the performance of a contract, franchise,
36 concession, or lease granted, let, or awarded for, and on behalf of,
37 the state.

38 (5) (A) “Contractor” means any person or persons, regardless
39 of race, color, creed, national origin, ancestry, sex, marital status,
40 disability, religious or political affiliation, age, or any sole

1 proprietorship, firm, partnership, joint venture, corporation, or
2 combination thereof that submits a bid and enters into a contract
3 with a representative of a state agency, department, governmental
4 entity, or other officer empowered by law to enter into contracts
5 on behalf of the state. “Contractor” includes any provider of
6 professional bond services who enters into a contract with an
7 awarding department.

8 (B) “Disabled veteran business enterprise contractor,
9 subcontractor, or supplier” means any person or entity that has
10 been certified by the administering agency pursuant to this article
11 and that performs a “commercially useful function,” as defined
12 below, in providing services or goods that contribute to the
13 fulfillment of the contract requirements:

14 (i) A person or an entity is deemed to perform a “commercially
15 useful function” if a person or entity does all of the following:

16 (I) (aa) Is responsible for the execution of a distinct element of
17 the work of the contract.

18 (ab) Carries out the obligation by actually performing, managing,
19 or supervising the work involved.

20 (ac) Performs work that is normal for its business services and
21 functions.

22 (II) Is not further subcontracting a portion of the work that is
23 greater than that expected to be subcontracted by normal industry
24 practices.

25 (ii) A contractor, subcontractor, or supplier will not be
26 considered to perform a “commercially useful function” if the
27 contractor’s, subcontractor’s, or supplier’s role is limited to that
28 of an extra participant in a transaction, contract, or project through
29 which funds are passed in order to obtain the appearance of a
30 disabled veteran business enterprise participation.

31 (6) “Disabled veteran” means a veteran of the military, naval,
32 or air service of the United States, including, but not limited to,
33 the Philippine Commonwealth Army, the Regular Scouts, “Old
34 Scouts,” and the Special Philippine Scouts, “New Scouts,” who
35 has at least a 10-percent service-connected disability and who is
36 domiciled in the state.

37 (7) (A) “Disabled veteran business enterprise” means a business
38 certified by the administering agency as meeting all of the
39 following requirements:

1 (i) It is a sole proprietorship at least 51 percent owned by one
 2 or more disabled veterans or, in the case of a publicly owned
 3 business, at least 51 percent of its stock is owned by one or more
 4 disabled veterans; a subsidiary that is wholly owned by a parent
 5 corporation, but only if at least 51 percent of the voting stock of
 6 the parent corporation is owned by one or more disabled veterans;
 7 or a joint venture in which at least 51 percent of the joint venture’s
 8 management, control, and earnings are held by one or more
 9 disabled veterans.

10 (ii) The management and control of the daily business operations
 11 are by one or more disabled veterans. The disabled veterans who
 12 exercise management and control are not required to be the same
 13 disabled veterans as the owners of the business.

14 (iii) It is a sole proprietorship, corporation, or partnership with
 15 its home office located in the United States, which is not a branch
 16 or subsidiary of a foreign corporation, foreign firm, or other
 17 foreign-based business.

18 (B) Notwithstanding subparagraph (A), after the death or the
 19 certification of a permanent medical disability of a disabled veteran
 20 who is a majority owner of a business that qualified as a disabled
 21 veteran business enterprise prior to that death or certification of a
 22 permanent medical disability, and solely for purposes of any
 23 contract entered into before that death or certification, that business
 24 shall be deemed to be a disabled veteran business enterprise for a
 25 period not to exceed three years after the date of that death or
 26 certification of a permanent medical disability, if the business is
 27 inherited or controlled by the spouse or child of that majority
 28 owner, or by both of those persons.

29 (8) “Foreign corporation,” “foreign firm,” or “foreign-based
 30 business” means a business entity that is incorporated or has its
 31 principal headquarters located outside the United States of
 32 America.

33 (9) “Goal” means a numerically expressed objective that
 34 awarding departments and contractors are required to make efforts
 35 to achieve.

36 (10) “Management and control” means effective and
 37 demonstrable management of the business entity.

38 (11) “Professional bond services” include services as financial
 39 advisers, bond counsel, underwriters in negotiated transactions,
 40 underwriter’s counsel, financial printers, feasibility consultants,

1 and other professional services related to the issuance and sale of
2 bonds.

3 *SEC. 3. Section 10111 of the Public Contract Code is amended*
4 *to read:*

5 10111. Commencing January 1, 2007, the department shall
6 make available a report on contracting activity containing the
7 following information:

8 (a) A listing of consulting services contracts that the state has
9 entered into during the previous fiscal year. The listing shall
10 include the following:

11 (1) The name and identification number of each contractor.

12 (2) The type of bidding entered into, the number of bidders,
13 whether the low bidder was accepted, and if the low bidder was
14 not accepted, an explanation of why another contractor was
15 selected.

16 (3) The amount of the contract price.

17 (4) Whether the contract was a noncompetitive bid contract,
18 and why the contract was a noncompetitive bid contract.

19 (5) Justification for entering into each consulting services
20 contract.

21 (6) The purpose of the contract and the potential beneficiaries.

22 (7) The date when the initial contract was signed, and the date
23 when the work began and was completed.

24 (b) The report shall also include a separate listing of consultant
25 contracts completed during that fiscal year, with the same
26 information specified in subdivision (a).

27 (c) The information specified in subdivisions (a) and (b) shall
28 also include a list of any contracts underway during that fiscal year
29 on which any change was made regarding the following:

30 (1) The completion date of the contract.

31 (2) The amount of money to be received by the contractor, if it
32 exceeds 3 percent of the original contract price.

33 (3) The purpose of the contract or duties of the contractor. A
34 brief explanation shall be given if the change in purpose is
35 significant.

36 (d) The level of participation, by agency, of disabled veteran
37 business enterprises in statewide contracting and shall include
38 dollar values of contract award for the following categories:

39 (1) Construction.

40 (2) Architectural, engineering, and other professional services.

1 (3) Procurement of materials, supplies, and equipment.

2 (4) Information technology procurements.

3 Additionally, the report shall include a statistical summary
4 detailing each awarding department's goal achievement and a
5 statewide total of those goals.

6 (e) The level of participation by small business in state
7 contracting including:

8 (1) Upon request, an up-to-date list of eligible small business
9 bidders by general procurement and construction contract
10 categories, noting company names and addresses and also noting
11 which small businesses also qualify as microbusinesses.

12 (2) By general procurement and construction contract categories,
13 statistics comparing the small business and microbusiness contract
14 participation dollars to the total state contract participation dollars.

15 (3) By awarding department and general procurement and
16 construction categories, statistics comparing the small business
17 and microbusiness contract participation dollars to the total state
18 contract participation dollars.

19 (4) Any recommendations for changes in statutes or state policies
20 to improve opportunities for small businesses and microbusinesses.

21 (5) A statistical summary of small businesses and
22 microbusinesses certified for state contracting by the number of
23 employees at the business for each of the following categories:
24 0-5, 26-50, 51-75, and 76-100.

25 (6) To the extent feasible, beginning in the year 2008, the
26 number of contracts awarded by the department in the categories
27 specified in paragraph (5).

28 (7) The number of contracts and dollar amounts awarded
29 annually pursuant to Section 14838.5 of the Government Code to
30 small businesses, microbusinesses, and disabled veteran business
31 enterprises.

32 (f) The level of participation of business enterprises, by race,
33 ethnicity, and gender of owner, in contracts as identified in Section
34 2051 of the Government Code, to the extent that the information
35 has been voluntarily reported to the department. In addition, the
36 report shall contain the levels of participation of business
37 enterprises, by race, ethnicity, and gender of owner, for the
38 following categories of contracts, to the extent that the information
39 has been voluntarily reported to the department:

40 (1) Construction.

1 (2) Purchases of materials, supplies, or equipment.

2 (3) Professional services.

3 (g) *In the years 2011 and 2012, any errors reported to the*
4 *department by an awarding agency as required by Sections 10302,*
5 *10344, and 12104.5, in the previous fiscal year.*

6 ~~SEC. 3.~~

7 SEC. 4. Section 10302 of the Public Contract Code is amended
8 to read:

9 10302. (a) Except in cases of emergency where immediate
10 purchase of goods without bid is necessary for the protection of
11 the public health, welfare, or safety, whenever the department
12 contracts for goods in excess of twenty-five thousand dollars
13 (\$25,000), or a higher amount as established by the director, the
14 department shall advertise in the California State Contracts Register
15 the availability of its solicitation, and interested suppliers, upon
16 request, shall be furnished with copies of the solicitation. In
17 addition to advertising in the California State Contracts Register,
18 the department shall post in a public place a copy of the solicitation,
19 which shall remain posted until seven days after an award has been
20 made. Whenever a contract in excess of twenty-five thousand
21 dollars (\$25,000), or a higher amount as established by the director,
22 is made pursuant to this section or Section 10301 without the taking
23 of bids, the department shall prepare a written document stating
24 the fact of the contract together with the facts requiring the contract
25 of the goods without the taking of bids. This document shall be
26 maintained by the department and shall be available as a public
27 record.

28 (b) (1) Every solicitation shall contain the following statement:

29 “It is unlawful for any person engaged in business within this
30 state to sell or use any article or product as a “loss leader” as
31 defined in Section 17030 of the Business and Professions Code.”

32 (2) *On and after March 31, 2010, and until December 31, 2011,*
33 *if a solicitation does not contain the statement required by*
34 *paragraph (1), the awarding agency shall report this error to the*
35 *department within 30 days of the date the awarding agency*
36 *discovers this error.*

37 (3) *The department shall post in the State Contracting Manual*
38 *instructions for including the statement required by paragraph (1)*
39 *in all affected contracts.*

1 (4) *The statement required by paragraph (1) shall be deemed*
2 *to be part of a solicitation even if the statement is inadvertently*
3 *omitted from the solicitation.*

4 ~~SEC. 4.~~

5 SEC. 5. Section 10344 of the Public Contract Code is amended
6 to read:

7 10344. (a) Contracts subject to the provisions of this article
8 may be awarded under a procedure that makes use of a request for
9 proposal. State agencies that use this procedure shall include in
10 the request for proposal a clear, precise description of the work to
11 be performed or services to be provided, a description of the format
12 that proposals shall follow and the elements they shall contain, the
13 standards the agency will use in evaluating proposals, the date on
14 which proposals are due and the timetable the agency will follow
15 in reviewing and evaluating them.

16 State agencies that use a procedure that makes use of a request
17 for proposal shall evaluate proposals and award contracts in
18 accordance with the provisions of subdivision (b) or (c). No
19 proposals shall be considered that have not been received at the
20 place, and prior to the closing time, stated in the request for
21 proposal.

22 (b) State agencies that use the evaluation and selection procedure
23 in this subdivision shall include in the request for proposal, in
24 addition to the information required by subdivision (a), a
25 requirement that bidders submit their proposals with the bid price
26 and all cost information in a separate, sealed envelope.

27 Proposals shall be evaluated and the contract awarded in the
28 following manner:

29 (1) All proposals received shall be reviewed to determine those
30 that meet the format requirements and the standards specified in
31 the request for proposal.

32 (2) The sealed envelopes containing the bid price and cost
33 information for those proposals that meet the format requirements
34 and standards shall then be publicly opened and read.

35 (3) The contract shall be awarded to the lowest responsible
36 bidder meeting the standards.

37 (c) State agencies that use the evaluation and selection procedure
38 in this subdivision shall include in the request for proposal, in
39 addition to the information required by subdivision (a), a
40 description of the methods that will be used in evaluating and

1 scoring the proposals. Any evaluation and scoring method shall
2 ensure that substantial weight in relationship to all other criteria
3 utilized shall be given to the contract price proposed by the bidder.

4 Proposals shall be evaluated and the contract awarded in the
5 following manner:

6 (1) All proposals shall be reviewed to determine which meet
7 the format requirements specified in the request for proposal.

8 (2) All proposals meeting the formal requirements shall then
9 be submitted to an agency evaluation committee which shall
10 evaluate and score the proposals using the methods specified in
11 the request for proposal. All proposals and all evaluation and
12 scoring sheets shall be available for public inspection at the
13 conclusion of the committee scoring process.

14 (3) The contract shall be awarded to the bidder whose proposal
15 is given the highest score by the evaluation committee.

16 (d) Nothing in this section shall require the awarding of the
17 contract if no proposals are received containing bids offering a
18 contract price that in the opinion of the state agency is a reasonable
19 price.

20 (e) (1) In addition to the information required by subdivision
21 (a), a request for proposal for a contract that involves the furnishing
22 of equipment, materials, or supplies shall contain the following
23 statement:

24 “It is unlawful for any person engaged in business within this
25 state to sell or use any article or product as a “loss leader” as
26 defined in Section 17030 of the Business and Professions Code.”

27 (2) *On and after March 31, 2010, and until December 31, 2011,*
28 *if a request for proposal does not contain the statement required*
29 *by paragraph (1), the awarding agency shall report this error to*
30 *the department within 30 days of the date the awarding agency*
31 *discovers this error.*

32 (3) *The department shall post in the State Contracting Manual*
33 *instructions for including the statement required by paragraph (1)*
34 *in all affected contracts.*

35 (4) *The statement required by paragraph (1) shall be deemed*
36 *to be part of a request for proposal even if the statement is*
37 *inadvertently omitted from the request for proposal.*

38 ~~SEC. 5.~~

39 SEC. 6. Section 12104.5 of the Public Contract Code is
40 amended to read:

1 12104.5. (a) All rules and requirements governing an
2 information technology acquisition, for which the department
3 determines that a request for proposal (RFP) is appropriate, shall
4 be communicated in writing to all vendors that have expressed an
5 intent to bid and shall be posted in a public location. Any changes
6 to the rules and requirements governing that RFP shall be
7 communicated in writing to all vendors that have expressed an
8 intent to bid and shall be posted in a public location. No
9 requirements other than those provided by law or outside of the
10 published RFP and posted addendums shall be used by the
11 department to score bids.

12 (b) (1) All requests for proposals shall contain the following
13 statement:

14 “It is unlawful for any person engaged in business within this
15 state to sell or use any article or product as a “loss leader” as
16 defined in Section 17030 of the Business and Professions Code.”

17 (2) *On and after March 31, 2010, and until December 31, 2011,*
18 *if a request for proposal does not contain the statement required*
19 *by paragraph (1), the awarding agency shall report this error to*
20 *the department within 30 days of the date the awarding agency*
21 *discovers this error.*

22 (3) *The department shall post in the State Contracting Manual*
23 *instructions for including the statement required by paragraph (1)*
24 *in all affected contracts.*

25 (4) *The statement required by paragraph (1) shall be deemed*
26 *to be part of a request for proposal even if the statement is*
27 *inadvertently omitted from the request for proposal.*

28 (c) The requirements of this section shall be in addition to any
29 other requirement provided by law.